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FILED
MAR 4 1948

No. 643

In the Supreme Court of the United States

October Term, 1947

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

v.

FRED CLIFFORD MARTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, reversing the judgment of the District Court for the District of Kansas dismissing a writ of habeas corpus and remanding respondent to petitioner's custody.

OPINIONS BELOW

The circuit court of appeals reversed the judgment of the district court without opinion on the authority of *Johnston* v. *Wright*, 137 F. 2d 914 (C. C. A. 9). The findings of fact and conclu-

sions of law of the district court appear at pp. 18–19 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered January 13, 1948 (R. 43), and a petition for rehearing (R. 43–48) was denied February 12, 1948 (R. 48). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

While confined in the Missouri State Penitentiary, respondent was sentenced by a federal district court to imprisonment for a term of ten years. The judgment provided that the sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Respondent was thereafter paroled from the state prison and surrendered by the state authorities to federal custody. The question is whether the judgment required that his federal sentence should not be executed by commitment under it until the term of respondent's state parole expires, or whether the judgment meant that upon release from confinement in the state prison, respondent should commence service of the federal sentence.

STATEMENT

On September 27, 1945, respondent pleaded guilty in a Missouri state court to a charge of

automobile theft, and he was sentenced to imprisonment for a term of three years (R. 27). He commenced service of the sentence in the Missouri State Penitentiary on the following day (R. 27).

On March 28, 1947, respondent was indicted in the United States District Court for the Western District of Missouri in four counts charging the forging and uttering of United States Treasury checks, in violation of Section 29 of the Criminal Code (18 U. S. C. 73) (R. 7–9). Respondent pleaded guilty to the charges of the indictment, and on April 10, 1947, he was sentenced to imprisonment for a term of ten years on each count, the sentences to run concurrently (R. 10–11). The judgment provided that the federal sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 11). Respondent was promptly returned to the state penitentiary to resume service of the state sentence, the full term of which expires August 26, 1948 (R. 30).

After imposition of the federal sentence, respondent was granted a parole by the Missouri Board of Probation and Parole (R. 30–31, 25–26). The federal authorities were notified of this action, and on May 13, 1947, he was delivered to their custody in the office of the deputy warden of the penitentiary (R. 31–32) and in the presence of the Secretary of the Missouri Board of Probation and Parole (R. 32). He has since been con-

fined under the federal sentence at the United States penitentiary at Leavenworth, Kansas.

On August 20, 1947, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, in which he challenged the legality of petitioner's custody of him on the ground that the federal judgment provided that his federal sentence should be served commencing upon the expiration of the full term of the state sentence, on August 26, 1948 (R. 2–3). Petitioner filed a return (R. 5–7) in which it was alleged that the judgment required that respondent start serving his federal sentence on May 13, 1947, when he was released from the state prison. The writ issued (R. 15), and after a hearing, the court ordered it discharged. Relying on the authority of *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919 (C. C. A. 7), and expressly declining to follow a contrary decision of the Ninth Circuit in *Johnston* v. *Wright*, 137 F. 2d 914, the district court held that the judgment required that the federal sentence should be served immediately upon respondent's release from the Missouri penitentiary (R. 16–19). On respondent's appeal to the Circuit Court of Appeals for the Tenth Circuit, that court reversed the judgment of the district court and remanded the cause with directions to discharge respondent, on the authority of the Ninth Circuit's decision in *Johnston* v. *Wright, supra* (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In reversing the judgment of the district court.

2. In holding that the judgment of conviction requires that respondent shall not be committed to serve the federal sentence until his state parole period expires.

REASONS FOR GRANTING THE WRIT

1. The single, narrow question presented by this case involves the proper construction of the language of the judgment providing that the federal sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 11). The question is whether this language gives respondent the right not to be required to serve his federal sentence until his parole period expires. There is no question here of a conflict between the two sovereignties, for the state has surrendered respondent to federal custody.

A similar question was first considered by the Circuit Court of Appeals for the Ninth Circuit in *Johnston* v. *Wright*, 137 F. 2d 914, where the federal judgment in question provided, "* * * the sentences herein imposed shall begin upon the expiration of the sentences which the said defendants are now serving in the Southern Illinois Penitentiary." The facts there were the same as in this case, and the court held that the prisoner

was entitled to be discharged from federal custody. It was the Ninth Circuit's view that the "starting of the sentence is premised upon the expiration of the state sentences and not upon Wright's release from the state prison." (137 F. 2d at 916.)

The question arose again in the Seventh Circuit in construing a federal judgment which provided that the sentence should commence "on the date of the expiration of the sentence under which said defendant is now confined in the Illinois State Penitentiary * * *." *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920. The Seventh Circuit said that it was unable to agree with all that was said in *Johnston* v. *Wright*, *supra*, and it held that the prisoner had no right not to be committed under his federal sentence until the expiration of his state parole period.

The decisions of the two courts below illustrate the conflict between the circuits. The district court agreed with the view of the Seventh Circuit and accordingly discharged the writ. The Tenth Circuit agreed with the Ninth Circuit's position and therefore reversed the order of the district court.

It is true that, literally construed, the judgment of conviction provides that the federal sentence should be served upon the expiration of the state sentence, and it is true that, technically speaking, the state sentence is not terminated until the

parole period expires.[1] But so to construe the judgment is to disregard the intent of the court. And this is no more justifiable in construing a judgment than it is to disregard the legislative intent in construing a statute. It seems plain to us that the pertinent language of the judgment of conviction was inserted for the purpose of preventing a collision between the federal and state sovereignties. The purpose of the court was to remit respondent to the state, which had first claim to his custody, and to defer execution of the federal sentence until such time as the State released him from custody.[2] That time arrived and the State surrendered him to the Federal Government.

It is unreasonable to assume that the sentencing court contemplated that respondent would enjoy an interlude at large before beginning service of his federal sentence. Certainly the interests of society are not served by permitting a prisoner with a concededly valid ten-year sentence pending to remain at large. And the interests of the defendant are not served by such a view. For it is to his advantage to serve his sentences without an interruption in confinement, so that when once

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[1] See Section 39, Department of Corrections Act, Laws of Missouri, 1945, pp. 723, 736.

[2] If the disputed language in the judgment had been omitted, respondent's federal sentence would have commenced pursuant to 18 U. S. C. 709a, when he was received in federal custody for transportation to a federal prison.

released he may effect his rehabilitation without being faced with the prospect of reincarceration.

The view of the Ninth Circuit means that in a case where a state prisoner has a long parole period, the beginning of the federal sentence may be interminably delayed or, in the case of a life-term prisoner who is placed on parole for life, it may never be served. Such a view does not contribute to the successful administration of the criminal laws or to public respect for the judicial process.

We agree with the Seventh Circuit and with the district court below that the judgment conferred no right on respondent not to be committed under his federal sentence when he was released from imprisonment by the state. His obligation is to serve a term of imprisonment for ten years, and he may not delay the time for the execution of the sentence by resting on a provision of the judgment that was intended to protect the State's interests, not to grant him what deceptively appears to him to be a bounty.

2. While the problem of this case can be averted in the future by providing in judgments that the federal sentence shall commence upon the discharge of the prisoner from confinement by the state (see *Kirk* v. *Squier*, 150 F. 2d 3 (C. C. A. 9), certiorari denied, 326 U. S. 775), there are many outstanding judgments which contain language substantially identical to that involved in the

judgment in this case, and it is anticipated that considerable habeas corpus litigation will follow. It is important in the administration of the federal penal system that the conflict of decisions be resolved by this Court, and that a uniform rule be applied in all the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

U. S. GOVERNMENT PRINTING OFFICE 1948